

Avoiding Generalities: The "Safety Defense" to a Disability Discrimination Claim Must Be Based on an Individual Assessment

To avoid disability discrimination charges, the Wisconsin Fair Employment Act ("WFEA") requires that employers make disability evaluations on an individual, case-by-case basis. What constitutes an adequate evaluation was the subject of dispute in the recent Wisconsin Court of Appeals case, *Szleszinski v. LIRC et. al.*, 2005 WI App. 229 (Wis. Ct. App. 2005).

Szleszinski worked as a commercial truck driver. Federal DOT regulations required him to obtain certification regarding his physical health. Szleszinski suffered from a mild case of Wilson's disease, a condition causing copper retention and known to result in neurological problems, liver disease and other medical complications. Despite his condition, Szleszinski always passed his physicals and possessed a valid federal certification.

Szleszinski's employer, Midwest Coast Transport ("Midwest"), received two complaints that Szleszinski had engaged in erratic driving. As a result, Midwest requested that he undergo further medical evaluation. Szleszinski saw both a physician and neurologist who recommended further testing, but nonetheless cleared him to drive.

A third physician then reviewed the resulting medical reports. This physician declared Szleszinski medically unfit to drive based on a Department of Transportation recommendation that individuals diagnosed with Wilson's disease, without exception, be denied certification. Notably, the physician stated in his report that further testing would not change his recommendation.

Based on this recommendation, Midwest terminated Szleszinski's employment. After he was terminated, Szleszinski visited a neurologist and radiologist, both of whom reported that his condition presented no impairment to his ability to work as a commercial truck driver.

Szleszinski sued Midwest for discrimination based on his disability. Midwest argued that his disability was reasonably related to his ability to work safely.

Whether a safety defense was viable, however, turned on whether the employer

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based its determination on a proper medical opinion under both the WFEA and federal guidelines applicable to interstate carriers. The court held that the medical opinion disqualifying Szleszinski from driving did not pass muster under either the WFEA or the pertinent federal regulations.

Specifically, the third medical opinion, based on a Department of Transportation recommendation that individuals with Wilson's disease be categorically denied certification, did not pass muster under the WFEA because it did not constitute a case-specific assessment of Szleszinski. Although the third physician reviewed Szleszinski's individual medical records, he based his conclusion on Szleszinski's diagnosis of Wilson's disease rather than on Szleszinski's individual medical records (which recommended further testing, but concluded nonetheless that Wilson's disease did not impair Szleszinski's ability to perform his job safely).

The court also ruled that the company's "safety defense" did not pass muster under the applicable federal regulations. Importantly, the Department of Transportation recommendation never joined the family of enacted regulations that create blanket disqualifications for commercial truck drivers - it simply remained a "recommendation." The court additionally held that the language of the regulations required a personal examination, rendering a "paper review" insufficient.

The Szleszinski decision does not specifically hold that a face-to-face medical examination is always necessary to meet the requirements for a safety defense under the WFEA. Certainly, employers of commercial truck drivers must conduct face-to-face medical examinations under Szleszinski. However, even employers in other industries should proceed with caution when considering a "paper review only" approach. The WFEA prohibits employers from taking action based on generalizations about individuals with a particular disability. Consequently, even in the absence of federal requirements, employers should consider arranging a medical examination of the disabled employee to ensure that any disqualifying medical opinion is based on how the employee's disability specifically affects his or her ability to do the job in question.

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